Boccard Oil & Gas Sdn Bhd v TNB Engineering and Consultancy Sdn Bhd & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)–1 OF 2008(W)
NIK HASHIM, AUGUSTINE PAUL AND ABDUL AZIZ MOHAMAD FCJJ
22 JANUARY 2009

Arbitration — Agreement — Reference of dispute — Whether defendant should be restrained from proceeding further with arbitration proceedings — Whether arbitration clause could be disregarded and/or superseded by a governing law clause — Whether Court of Appeal had power and jurisdiction to injunct an arbitration proceeding between two parties for purpose of consolidating arbitration with a pending civil suit

Civil Procedure — Appeal — Appeal to Federal Court — Whether questions posed related to matters decided by the Court of Appeal — Whether fell within ambit of s 96(a) of the Courts of Judicature Act 1964

When TBV Power (Malaysia) Sdn Bhd ('TBV) were appointed by Tenaga Nasional Bhd as the contractors for a project for the supply and installation of works ('the project'), TVB entered into two subcontracts with the plaintiff ('the subcontracts'). Under the sub-contracts, the plaintiff agreed to design, fabricate and deliver low pressure fabricated pipe and low pressure pipe supports for the project. Thereafter, the plaintiff entered into two sub-subcontracts with the defendant ('the sub-subcontracts') whereby the defendant agreed to design, fabricate and deliver low pressure fabricated pipe and low pressure pipe supports at an agreed price. In the meantime the plaintiff and TBV entered into a settlement agreement in respect of the sums due under the subcontracts between the plaintiff and TBV. However, when a dispute arose between the plaintiff and TBV with regard to the settlement agreement, the plaintiff initiated a civil suit against TBV ('the pending civil suit'). When a dispute arose between the plaintiff and the defendant in respect of the sub-subcontracts the defendant referred the dispute to arbitration pursuant to the terms of the sub-subcontract, and arbitrators were duly appointed. The plaintiff then filed an originating summons in the High Court seeking, inter alia, for a declaration that any dispute between the plaintiff and the defendant in respect of the sub-subcontracts be dealt with by the courts; that the appointment of the arbitrators by the defendant was

invalid; and that the defendant be restrained from proceeding further with arbitration proceedings pending the disposal of the hearing of the originating summons and/or the civil suit initiated by the plaintiff against TBV. In the sub-subcontracts, cl 40 relates to arbitration while cl 41 is the governing law clause. The High Court took the view that cl 40 prevailed over cl 41 and accordingly dismissed the originating summons. The plaintiff then appealed to the Court of Appeal which allowed the plaintiff's appeal. The Court of Appeal decided, inter alia, that since the disputes involving the three parties namely the dispute between the plaintiff and the defendant under the sub-subcontracts, which the defendant had initiated steps to take to arbitration, and the dispute between the plaintiff and TBV under the settlement agreement, ie the pending civil suit, ought to be resolved in the pending civil suit as this would avoid duplicity of proceedings. To give effect to the decision of the Court of Appeal that the two disputes ought to be resolved in the pending civil suit, it was necessary that the arbitration of the dispute between the defendant and the plaintiff under the sub-subcontracts be stayed. Thus the Court of Appeal had made an order restraining the defendant from proceeding with the arbitration until further order. The defendant dissatisfied with this decision, obtained leave to appeal pursuant to s 96(a) of the Courts of Judicature Act 1964 ('the CJA') on two questions of law. The first was whether a valid arbitration clause that was accepted and agreed to by the parties could be disregarded and/or superseded by a governing law clause. This leave question arose from the Court of Appeal's decision that cl 40 of the sub-subcontracts was inconsistent with cl 41 and therefore should not be given any effect. The second question was whether the Court of Appeal had the power and jurisdiction to injunct an arbitration proceeding between two parties for the purpose of consolidating the arbitration with a pending civil suit in the absence of any provision in the arbitration agreement or the Arbitration Act 1952 to enable such a consolidation. In the present appeal the defendant contended that cl 41 did not override cl 40. The plaintiff also conceded that cl 41 did not override cl 40. However, the plaintiff contended that despite the existence of the arbitration cl 40 the Court of Appeal had the power to put the arbitration under injunction and had good reason to exercise the power in the circumstances of this case. The plaintiff also submitted that the second leave-question ought not to have included that part about consolidation being the purpose of the injunction because the Court of Appeal did not state the purpose of the injunction.

Held, dismissing the appeal with costs:

(1) (per **Augustine Paul FCJ**) Under the requirements of s 96(a) of the CJA this court has the power to decline to answer questions posed in appropriate instances in spite of the fact that leave to appeal had been

granted with the result that the appeal must be dismissed without a consideration of its merits. In any case, both the questions posed did not relate to matters decided by the Court of Appeal and therefore did not come within the ambit of s 96(a) (see para 8)

(2) (per **Augustine Paul FCJ**) The first leave question was very general in nature and merely seeks a resolution of the prevailing effect of a governing law clause over an arbitration clause. The case law on this issue makes it clear that in such cases it is a matter of construction of the two conflicting provisions based on the language employed in them that determines which one is to prevail. The question posed however, neither made reference to a consideration of this critical issue nor dealt with the judgment or order by the Court of Appeal (see para 10).

(3) (per **Augustine Paul FCJ**) There was nothing in the judgment of the Court of Appeal to suggest that the arbitration proceeding was injuncted for the purpose of consolidating it with the pending civil suit. The order was made in the light of the conclusion of the Court of Appeal that cl 40 was ineffective. Therefore, the second leave question also did not deal with the judgment or order made by the Court of Appeal. On the contrary it was confined to a determination of the power of the Court of Appeal to order consolidation in the circumstances described in the question and was therefore hypothetical (see para 13)

(4) (per **Abdul Aziz Mohamad FCJ**) With the plaintiff conceding that cl 41 did not override cl 40, the first leave question did not require to be answered (see para 21).

(5) (per **Abdul Aziz Mohamad FCJ**) From the manner in which the second leave question was framed, the answer to it should be in the negative, that is to say, that the Court of Appeal did not have the power to injunct the arbitration, not because it was not vested with the power per se, but because the purpose of the injunction for the purpose of consolidation, as stated in the question, was not capable of achievement in law. The inclusion of the second part, the purpose part, to the second leave question implied a stand that even though the Court of Appeal has the power to injunct arbitration proceedings it does not have the power to do so if it is for the purpose of consolidation. However, of primary importance was that the Court of Appeal did not place an injunction on the arbitration for the purpose of consolidation. Therefore, the second leave question had no factual basis and was hypothetical or conjectural as it stood and so could not be answered. It could only be answered if the second part to the question was removed, and in such an event it would be answered in the affirmative (see paras 24–25)

[Bahasa Malaysia summary

Apabila TBV Power (Malaysia) Sdn Bhd ('TBV) dilantik oleh Tenaga Nasional Bhd sebagai kontraktor untuk projek pembekalan dan pemasangan kerja ('projek tersebut'), TVB memasuki dua subkontrak dengan plaintif ('subkontrak'). Di bawah subkontrak tersebut, plaintif bersetuju untuk mereka, memasang dan menghantar paip pasang siap tekanan rendah dan sokongan paip tekanan rendah untuk projek tersebut. Kemudiannya, plaintif memasuki dua sub-subkontrak dengan defendan ('sub-subkontrak') di mana defendan bersetuju untuk mereka, memasang dan menghantar paip pasang siap tekanan rendah dan sokongan paip tekanan rendah pada harga yang dipersetujui. Sementara itu, plaintif dan TBV memasuki perjanjian penyelesaian berkaitan jumlah yang kena bayar di bawah subkontrak di antara plaintif dan TBV. Walau bagaimanapun, apabila pertikaian bangkit di antara plaintif dan TBV berkaitan perjanjian penyelesaian, plaintif memulakan guaman sivil terhadap TBV ('guaman sivil belum selesai tersebut'). Apabila pertikaian berbangkit di antara plaintif dan defendan berkaitan sub-subkontrak tersebut, defendan merujuk pertikaian tersebut kepada timbang tara berikutan terma-terma sub-subkontraktor, dan penimbangtara dilantik seperti yang sepatutnya. Plaintif kemudiannya memfailkan saman pemula di Mahkamah Tinggi memohon, antara lain, untuk perisytiharan bahawa apa-apa pertikaian di antara plaintif dan defendan berkaitan sub-subkontrak tersebut diuruskan oleh mahkamah; bahawa pelantikan penimbangtara oleh defendan tidak sah; dan bahawa defendan dihalang daripada meneruskan dengan selanjutnya prosiding timbang tara sementara penyelesaian pendengaran saman pemula dan/atau guaman sivil yang dimulakan oleh plaintif terhadap TBV. Klausa 40 di dalam sub-subkontrak tersebut adalah berkaitan timbang tara sementara klausa 41 adalah klausa undang-undang yang mengawal. Mahkamah Tinggi berpendapat bahawa klausa 40 mengatasi klausa 41 dan oleh itu menolak saman pemula tersebut. Plaintif kemudiannya merayu kepada Mahkamah Rayuan yang membenarkan rayuan plaintif. Mahkamah Rayuan memutuskan, antara lain, bahawa memandangkan pertikaian tersebut melibatkan ketiga-tiga pihak terutamanya pertikaian di antara plaintif dan defendan di bawah sub-subkontrak tersebut, di mana defendan telah memulakan langkah untuk membawanya kepada timbang tara, dan pertikaian di antara plaintif dan TBV di bawah perjanjian penyelesaian, iaitu guaman sivil belum selesai tersebut patut diselesaikan di dalam guaman sivil belum selesai tersebut kerana ini akan mengelakkan daripada prosiding kependuaan. Untuk memberikan kesan kepada keputusan Mahkamah Rayuan bahawa kedua-dua pertikaian patut diselesaikan di dalam guaman sivil belum selesai tersebut, adalah perlu timbang tara pertikaian di antara defendan dan plaintif di bawah sub-subkontrak tersebut ditangguhkan. Oleh itu, Mahkamah Rayuan telah mengeluarkan perintah menghalang defendan

daripada meneruskan dengan timbang tara sehingga perintah selanjutnya. Defendan tidak puas hati dengan keputusan ini, memperolehi izin untuk merayu berikutan s 96(a) Akta Mahkamah Kehakiman 1964 ('AMK') atas dua soalan undang-undang. Soalan pertama adalah sama ada klausa timbang tara yang sah yang diterima dan dipersetujui oleh kedua-dua pihak boleh diabaikan dan/atau digantikan oleh klausa undang-undang yang mengawal. Soalan izin ini berbangkit daripada keputusan Mahkamah Rayuan bahawa klausa 40 sub-subkontrak tidak konsisten dengan klausa 41 dan oleh itu tidak patut diberi apa-apa kesan. Soalan kedua adalah sama ada Mahkamah Rayuan mempunyai kuasa dan bidang kuasa untuk menghalang prosiding timbang tara di antara kedua-dua pihak bagi tujuan untuk menggabungkan timbang tara tersebut dengan guaman sivil belum selesai tersebut di dalam ketiadaan apa-apa peruntukan di dalam perjanjian timbang tara tersebut atau Akta Timbangtara 1952 untuk membolehkan penggabungan sedemikian. Di dalam rayuan ini, defendan berhujah bahawa klausa 41 tidak mengatasi klausa 40. Plaintif juga mengaku bahawa klausa 41 tidak mengatasi klausa 40. Walau bagaimanapun, plaintif berhujah bahawa walaupun wujud klausa 40 timbang tara tersebut, Mahkamah Rayuan mempunyai kuasa untuk meletakkan timbara tara tersebut di bawah injunksi dan mempunyai alasan yang baik melaksanakan kuasa di dalam keadaan kes ini. Plaintif juga berhujah bahawa soalan izin kedua tersebut patut tidak memasukkan bahagian mengenai penggabungan bagi tujuan injunksi kerana Mahkamah Rayuan tidak menyatakan tujuan injunksi tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Augustine Paul HMP**) Di bawah keperluan s 96(a) AMK, mahkamah ini mempunyai kuasa untuk menolak daripada menjawab soalan-soalan yang dikemukakan dalam keadaan wajar walaupun fakta bahawa izin untuk merayu telah diberikan dengan keputusan bahawa rayuan mesti ditolak tanpa mempertimbangkan meritnya. Walau bagaimanapun, kedua-dua soalan yang dikemukakan tidak berkaitan perkara yang diputuskan oleh Mahkamah Rayuan dan oleh itu tidak terangkum di dalam lingkungan s 96(a) (lihat perenggan 8).

(2) (oleh **Augustine Paul HMP**) Soalan izin pertama adalah bersifat am dan semata-mata memohon resolusi kesan mengatasi klausa undang-undang yang mengawal ke atas klausa timbang tara. Undang-undang kes atas isu ini menjelaskan bahawa dalam kes sedemikian ia adalah perkara pembentukan dua peruntukan yang bercanggah berdasarkan bahasa yang digunakan di dalamnya yang menentukan yang mana satu untuk diatasi. Soalan yang dikemukakan walau bagaimanapun, tidak membuat rujukan kepada pertimbangan

isu kritikal ini dan juga tidak berurusan dengan penghakiman atau perintah oleh Mahkamah Rayuan (lihat perenggan 10).

(3) (oleh **Augustine Paul HMP**) Tidak terdapat apa-apa di dalam penghakiman Mahkamah Rayuan yang mencadangkan bahawa prosiding timbang tara telah dihalang untuk tujuan penggabungannya dengan guaman sivil yang belum selesai. Perintah dibuat berdasarkan keputusan Mahkamah Rayuan bahawa klausa 40 tidak berkesan. Oleh itu, soalan izin kedua juga tidak berkaitan dengan penghakiman atau perintah yang dibuat oleh Mahkamah Rayuan. Sebaliknya ia terhad kepada penentuan kuasa Mahakam Rayuan untuk memerintahkan penggabungan di dalam keadaan yang dinyatakan di dalam soalan dan oleh itu adalah andaian (lihat perenggan 13).

(4) (oleh **Abdul Aziz Mohamad HMP**) Dengan plaintif mengaku bahawa klausa 41 tidak mengatasi klausa 40, soalan izin pertama tidak perlu dijawab (lihat perenggan 21).

(5) (oleh **Abdul Aziz Mohamad HMP**) Daripada cara bagaimana soalan izin kedua dirangka, jawapan kepadanya sepatutnya bersifat negatif, iaitu, bahawa Mahkamah Rayuan tidak mempunyai kuasa untuk menghalang timbang tara tersebut, bukan kerana ia tidak diletakhakkan dengan kuasa semata-mata, tetapi kerana tujuan injunksi untuk tujuan penggabungan, seperti yang dinyatakan di dalam soalan, tidak boleh dicapai di dalam undang-undang. Pemasukan bahagian kedua, bahagian tujuan kepada soalan izin kedua membayangkan kedudukan bahawa walaupun Mahkamah Rayuan mempunyai kuasa untuk menghalang prosiding timbang tara, ia tidak mempunyai kuasa untuk berbuat demikian jika ia untuk penggabungan. Walau bagaimanapun, yang penting adalah bahawa Mahkamah Rayuan tidak meletakkan injunksi atas timbang tara untuk tujuan penggabungan. Oleh itu, soalan izin kedua dengan sendirinya tidak mempunyai asas fakta dan adalah andaian atau tekaan dan oleh itu tidak boleh dijawab. Ia hanya boleh dijawab jika bahagian kedua kepada soalan tersebut dikeluarkan, dan dalam keadaan sedemikian ia akan dijawab secara pengiaan (lihat perenggan 24–25).]

Notes

For cases on appeal to Federal Court, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 749–756.

For cases on reference of dispute, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1222–1231.

Cases referred to

Joceline Tan Poh Choo & Ors v V Muthusamy [2008] 6 MLJ 621, FC (refd)

Lovelock (EJR) Ltd v Exportles [1968] 1 Lloyd's Rep 163, CA (refd)

Paul Smith Ltd v H & S International Holding Inc [1991] 2 Lloyd's Rep 127, Ch D (refd)
Shell International Petroleum Co Ltd v Coral Oil Co Ltd [1999] 1 Lloyd's Rep 72 (refd)

Legislation referred to
Arbitration Act 1952
Courts of Judicature Act 1964 s 96(a)
Rules of the High Court 1980 O 4 r 1(1)

Appeal from: Civil Appeal No W-02–129 of 2006 (Court of Appeal, Putrajaya)

Bastian Vendargon (James Monteiro and Shirlena Yogeswaran with him) (Zaid Ibrahim & Co) for the appellant.
GK Ganesan (Nor Sherina bt Nofal with him) (Philip Choong & Co) for the respondents.

Augustine Paul FCJ:

[1] This is yet another instance which brings into focus the propriety of questions framed for the purpose of an appeal to this court pursuant to s 96(a) of the Courts of Judicature Act 1964 ('s 96(a)').

[2] The facts of the case as outlined in the judgment of the Court of Appeal are as follows. TBV Power (M) Sdn Bhd ('TBV') is a company incorporated in Malaysia and was the contractor for the supply and installation of works for the third phase of Sultan Salehuddin Abdul Aziz Power Station-Phase 3 (units 5 and 6) located in the vicinity of Kapar for Tenaga Nasional Bhd ('the project') and comprising 2 x 500 MW turbine generator units complete with all auxiliary equipment and materials. In line with the appointment of TBV as the contractor for the project, the plaintiffs and TBV entered into two subcontracts both dated 20 September 1996 whereby the plaintiffs agreed to design, fabricate and deliver low pressure fabricated pipe and low pressure pipe supports for the project in accordance with the conditions and specifications set out in s IV of the subcontracts for the sum of RM5,890,855.09 and RM1,458,144.92 respectively, ('the subcontracts'). Thereafter, the plaintiffs and the defendants entered into two sub-subcontracts on 22 January 1997 and 29 January 1997, whereby the defendants agreed to design, fabricate and deliver low pressure fabricated pipe and low pressure pipe supports for the project in accordance with the conditions and specifications set out in s IV of the sub-subcontracts for the sum of RM5,610,300 and RM1,388,700 respectively ('the sub-subcontracts'). A dispute arose between the plaintiffs and the defendants

in respect of the sub-subcontracts and the defendants referred the dispute to arbitration pursuant to the terms of the sub-subcontracts. Arbitrators were duly appointed. The plaintiffs and TBV entered into a settlement agreement ('the settlement agreement') in respect of the sums due under the subcontracts between the plaintiffs and TBV. There subsequently arose a dispute in regard to the settlement agreement in respect of which the plaintiffs initiated Civil Suit No D3–22–66 of 2005 ('the D3 action') against TBV. The defendants is not a party to the settlement agreement.

[3] The relevant clauses relating to arbitration are contained in cll 40 and 41 of the sub-subcontract ('cl 40' and 'cl 41' respectively). They read as follows:

GC 40-Arbitration

(i) If at any time any question, or difference shall arise between the Sub-contractor and the Sub-Subcontractor, either party shall, as soon as reasonably practicable, give to the other notice in writing of the existence of such question, dispute, or difference, specifying its nature and the point at issue, and the same shall be referred to the arbitration of a person to be agreed upon or failing such agreement within 6 weeks, to some person appointed on the application of either of the parties to the Contract by the President for the time being of the Institution of Engineers (Malaysia). Any such reference shall be deemed to be as submission to Arbitration under the provision of the Arbitration Act, Malaysia 1952 (revised 1972) and/or any statutory modification or re-enactment thereof for the time being in force. The award of the Arbitration shall be final and binding on the parties. Upon every or any such reference the costs of and incidental to the reference and award respectively shall be in the discretion of the Arbitration, who may determine the amount thereof or the basis upon which the same shall be ascertained.

(ii) Performance of the Contract shall continue during arbitration proceeding unless the Subcontractor shall order the suspension thereof or of any part thereof and if any such suspension shall be ordered the reasonable expenses of the Sub-Subcontractor occasioned by such suspension shall be added to the Contract Price.

GC 41-Law Governing Contract

(i) The Contract shall be governed and construed according to Malaysian Law and the Courts of Malaysia shall have exclusive jurisdiction to hear and determine all actions and proceedings arising

out of the Contract and the Sub-Subcontractor hereby submits to the jurisdiction of the Courts in Malaysia, for the purpose of all such actions and proceedings.

(ii) The Sub-Subcontractor binds himself to acknowledge and accepts as final in all respects within the country of domicile of the Sub-Subcontractor or elsewhere any decision or award of an arbitrator or judgment in any court in Malaysia in relation to any dispute between the parties under the Contract whether in respect of payments to be made hereunder or in other matters. This undertaking is valid in all respects in case any such decision, award or judgment is to be enforced in the courts of the country of domicile of the Sub-Subcontractor or elsewhere in any manner.

[4] The plaintiffs filed an originating summons dated 16 February 2005 in the High Court seeking a declaration, inter alia, that:

(i) any dispute between the plaintiffs and the defendants in respect of the sub-subcontracts be dealt with by the courts of Malaysia;

(ii) the appointment of the arbitrators by the defendants pursuant to cl 40 is invalid; and

(iii) the defendants be restrained from proceeding further with the arbitration proceedings pending the hearing and disposal of the originating summons and/or pending the hearing and disposal of the plaintiffs' claim against TBV in the D3 action.

[5] The learned High Court judge took the view that cl 40 prevailed over cl 41 and accordingly dismissed the originating summons on 16 January 2006. The plaintiffs then appealed to the Court of Appeal. The Court of Appeal found that there are common issues of law involving the plaintiffs, the defendants and TBV and that the plaintiffs ought to bring in the defendants into the D3 action to indemnify themselves. It was also found that unless the plaintiffs can bring the defendants as a party to the D3 action, or manage to consolidate their action with the one against TBV, the plaintiffs would be prejudiced. It was further found that the arbitration proceedings would deprive the plaintiffs of their right to institute third party proceedings against TBV to indemnify them in the defendants's claim against them under the sub-subcontracts. This would result in duplicity of proceedings. It was also found that the dispute between the plaintiffs and the defendants is whether the plaintiffs owe the defendants any sum of money and if so, the amount. This dispute is in fact an integral part of the dispute between the plaintiffs and TBV. Thus the Court of Appeal expressed the view that the plaintiffs are justified in invoking O 4 r 1(1) of the Rules of the High Court 1980 in aid

of its cause. Finally, it was held that as cl 40 is inconsistent with cl 41 it should not be given any effect. The Court of Appeal then allowed the appeal with an order in terms of the declaration as prayed for in the plaintiffs' originating summons dated 16 February 2005. No order as to costs was made.

[6] The defendants obtained leave to appeal to this court pursuant to s 96(a) on the following two questions:

(a) Whether the existence of a valid arbitration clause accepted and agreed to by the appellant and the respondents can be disregarded and/or superseded by a governing law clause?

(b) Whether the Court of Appeal has the power and jurisdiction to injunct an arbitration proceeding between two parties for the purpose of consolidation of the said arbitration with a civil suit involving a third party (not a party to the arbitration proceedings) in the absence of any provisions in the arbitration agreement or the Arbitration Act 1952 to enable such a consolidation?

[7] Before dealing with the two questions, it is perhaps necessary to be reminded of the requirements of s 96(a) which reads as follows:

> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court —
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage.

[8] It is perhaps necessary to refer to *Joceline Tan Poh Choo & Ors v V Muthusamy* [2008] 6 MLJ 621 where this court in reviewing s 96(a) said at pp 631–634:

> In commenting on the criteria to be satisfied in an application for leave to appeal under s 96(a) Edgar Joseph Jr FCJ said in *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 at p 265:
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> > To sum up, without prejudice to the generality of what we have thus far said, the Federal Court exercises its sensitive power to grant leave to appeal in civil cases sparingly and will not grant such leave unless *both* of the following criteria are satisfied by an intending appellant:

A (1) the judgment of the Court of Appeal has raised a point of general principle *which the Federal Court has not previously decided* or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage; and

B (2) if the point is decided in favour of the intending appellant, there is a prima facie case for success in the appeal.

(Emphasis added.)

It must be observed, and with respect, that the use of the words '... which the C Federal Court has not previously decided …' in criterion (1) may not be an accurate representation of s 96(a). An analysis of the section will make this clear. It contains two circumstances in which an appeal may be made to this court. They are:

Limb (a) A question of general principle decided for the first time.

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It is obvious that this is a reference to a decision of the Court of Appeal for the first time on a question of general principle. As s 96 (a) deals with appeals from the Court of Appeal to the Federal Court the word '… decided …' in s 96 (a) refers to a decision that has already been made. The use of the word in the past tense makes this manifestly patent. A decision that has been made can only be E a reference to a decision of the Court of Appeal.

Limb (b) A question of importance upon which further argument and a decision of the Federal Court would be to public advantage.

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This limb is an unambiguous reference to an issue upon which there have been two or more previous decisions of the Court of Appeal. This is made clear by the purpose of limb (a) and the language of this limb itself. A reference to further argument and the fact that a decision of the Federal Court would be to public advantage has in contemplation two or more previous decisions of the Court of Appeal on the same issue which are, for example, in conflict or are wrong or G made in ignorance of a binding precedent or made in following a decision of the Federal Court which is vague or wrong. Such a situation would create confusion to the public in the application of the legal principle involved to their affairs. In that event further argument and a decision of the Federal Court on the issue involved would be to public advantage as the confusion would be resolved.

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It is thus clear that both limb (a) and limb (b) are separate and as they cater for two distinct circumstances they are mutually exclusive. It is now appropriate to consider the use of the words '… which the Federal Court has not previously decided …' referred to earlier in the passage from *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 in limb I (a). It will be recalled that the reference in that limb to the decision made for the first time is to that of the Court of Appeal. It is true that the fact that the Federal Court has not previously decided on a point may mean that it is also the first time that the Court of Appeal has decided on the point as contemplated by limb (a). But, unfortunately, it can also mean that the Court of Appeal has decided on the point

previously and that the Federal Court has not decided on it yet thereby making it a case upon which the Federal Court has not previously decided. It is clear by now that limb (b) becomes relevant only when there are two or more decisions of the Court of Appeal on a certain point. Thus the use of the words '… which the Federal Court has not previously decided …' in limb (a) in *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 will create confusion in the proper meaning to be accorded to both the limbs. They ought to be replaced with the words '… decided by the Court of Appeal for the first time …' as contemplated by s 96 (a). That will remove any confusion that may arise and, additionally, bring into proper focus the underlying distinction between both the limbs.

In an application for leave to appeal an intending appellant must identify the proper limb under which his case falls and address the arguments accordingly.

The next matter for consideration is whether the point if decided in favour of the intending appellant will show that there is a prima facie case for success in the appeal. This would depend on the issue to be raised in the appeal and, thus, on the nature and manner in which the question for appeal is framed. It must be so couched as to incorporate a point of law which has the effect of reversing findings made against the intending appellant without any further evaluation of the evidence. This in turn means that the answer given to the question must be such that it has the effect of reversing the judgment. It is only then that the question of success in the appeal can arise. It must be remembered that the very object of making appeals to this court subject to leave is to prevent frivolous and needless appeals (see *Kredin Sdn Bhd v OCBC Bank (M) Bhd* [1998] 3 MLJ 78). Leave to appeal on a proposed question will therefore not be granted if there is no hope of success (see *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681). This is logical. If the answer to the proposed question is obvious in the sense that it will not be in favour of the intending appellant there will be no basis for a prima facie case for success in the appeal. Where a decision depends on the application of a well-established principle to an individual set of facts, a further appeal to the Federal Court will be of no utility if it will do nothing to clarify or refine the principle, so as to make it applicable to other situations in the future (see *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257). The question posed must relate to a matter in respect of which a determination has been made by the Court of Appeal as otherwise it will be academic (see *The Minister for Human Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225 and *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513). It follows that a question cannot be based on an assumption that a finding has been made in respect of it when, as a matter of fact, no such finding has been made. However, a new point of law can be raised if all the facts necessary to support it have been raised in the Court of Appeal (see *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517). Needless to say, the parties may by consent reframe or amend the question at the hearing stage of the appeal with the approval of the court as demonstrated in *The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469.

A The corollary is that if there is no prospect of success in the appeal the position of the appellant will not be affected and it would be pointless hearing the appeal. In *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469 Viscount Simon LC said at p 470:

> B I do not think that it would be a proper exercise of the authority which this house possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the house undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any C way affecting the position between the parties.

In *Loknath Padhan v Birendra Kumar Sahu* AIR 1974 SC 505 Bhagwati J said at p 508:

> D If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties it would be waste of public time and indeed not proper exercise of authority for the court to engage itself in deciding it. … It would be clearly futile and meaningless for the court to decide an academic question, the answer to which would not affect the position of one party or the other. The court would not engage in a fruitless exercise. It would E refuse to decide a question, unless it has a bearing on some right or liability in controversy between the parties. If the decision of a question would be wholly ineffectual so far as the parties are concerned, it would be not only unnecessary and pointless but also inexpedient to decide it and the court would properly decline to do so.

F Thus this court has the power to decline to answer questions posed in appropriate instances in spite of the fact that leave to appeal had been granted with the result that the appeal must be dismissed without a consideration of its merits. This is demonstrated by cases such as *The Minister for Human Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225; *Raphael Pura v Insas Bhd & Anor* [2003] 1 G MLJ 513; *Sri Kelangkota–Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257; *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 and *Tan Heng Chew & Ors v Tan Kim Hor & Ors* [2006] 5 MLJ 313.

H **[9]** It is now apposite to consider the two questions posed.

Question No 1 Whether the existence of a valid arbitration clause accepted and agreed to by the appellant and the respondents can be disregarded and/or superseded by a governing law clause?

I **[10]** Quite obviously the object of this question is to determine whether cl 40 can be superseded by cl 41. But the manner in which it is couched does not give such an impression. Firstly, it is anchored on the premise that the arbitration clause is valid and has been accepted and agreed to by both the

parties. If it is valid and accepted and agreed to as such by both parties the question of it being superseded does not and cannot arise as it must prevail. On the contrary the Court of Appeal did not decide that the arbitration clause is valid. It was ruled that it was inconsistent with cl 41 and was thereby ineffective. This is in direct contrast to the manner in which the question has been framed. Secondly, the question seeks a resolution of the prevailing effect of a 'governing law clause'. Such a clause without any qualification is a reference to a clause that deals exclusively with the applicable law. The Court of Appeal did not consider such a position. It dealt with cl 41 which, apart from dealing with the applicable law, also dealt with the jurisdiction of the courts to hear and determine all actions and proceeding arising out of the contract between the parties. This does not accord with the manner in which the question has been framed which is confined to the prevailing effect of a governing law clause per se. Be that as it may, the question is very general in nature. It merely seeks a resolution of the prevailing effect of a governing law clause over an arbitration clause. Cases like *Lovelock (EJR) Ltd v Exportles* [1968] 1 Lloyd's Rep 163; *Shell International Petroleum Co Ltd v Coral Oil Co Ltd* [1999] 1 Lloyd's Rep 72 and *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 make it clear that in such cases it is a matter of the construction of the two conflicting provisions based on the language employed in them that determines which one is to prevail. The question posed makes no reference to a consideration of this critical issue. Thus the question as it stands does not deal with the judgment or order made by the Court of Appeal and, in any event, is very general.

Question No 2 Whether the Court of Appeal has the power and jurisdiction to injunct an arbitration proceeding between two parties for the purpose of consolidation of the said arbitration with a civil suit involving a third party (not party to the arbitration proceedings) in the absence of any provision in the arbitration agreement or the Arbitration Act 1952, to enable such a consolidation?

[11] This question would be justified if the Court of Appeal had in fact injuncted the arbitration proceeding between the two parties for the purpose of consolidating it with a civil suit. The relevant part of the judgment of the Court of Appeal which deals with the issue of consolidation reads as follows:

> It is our judgment that the sub-subcontracts cannot be read in isolation as being between the plaintiffs and the defendants to the exclusion of any other party, in particular, TBV. The sub-subcontracts must necessarily be subject to the subcontracts between the plaintiffs and TBV. It is for this reason that we find the plaintiffs are justified in invoking the provision of O 4 r 1(1) of the Rules of the High Court 1980, in aid of its cause and which states as follows:

A Where two or more causes or matters are pending, then, if it appears to the Court —

(a) that some common question of law or fact arises in both or all of them; or

B (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or

(c) that for some other reason it is desirable to make an order under this rule,

C the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

D

[12] There is nothing in this part of the judgment of the Court of Appeal to suggest that it injuncted the arbitration proceedings for the purpose of consolidating it with the civil suit which involves a third party (the D3 action). It merely states that the plaintiffs would be justified in resorting to E consolidation in aid of their cause. It must be further observed that the order made by the Court of Appeal was merely in terms of the declarations prayed for in the plaintiffs' originating summons dated 16 February 2005 and the material part of the order made in this regard as reflected in the order of court reads as follows:

F DAN ADALAH SELANJUTNYA DIPERINTAHKAN bahawa responden adalah dilarang dari meneruskan dengan timbangtara sehingga perintah selanjutnya.

G **[13]** Again there is nothing in this part of the order made by the Court of Appeal to suggest that the arbitration proceeding was injuncted for the purpose of consolidating it with the civil suit. The order was made in the light of the conclusion of the Court of Appeal that cl 40 is ineffective. Thus, this question also does not deal with the judgment or order made by the Court H of Appeal. On the contrary it is confined to a determination of the power of the Court of Appeal to order consolidation in the circumstances described in the question and is therefore hypothetical.

[14] It follows that as both the question posed do not relate to matters I decided by the Court of Appeal they do not come within the ambit of s 96(a). It is therefore not necessary to answer them.

[15] My learned brother Nik Hashim bin Nik Ab Rahman FCJ agrees with this judgment while my learned brother Abdul Aziz bin Mohamad FCJ agrees

with the conclusion though for different reasons. In the upshot the appeal is dismissed with costs. Deposit to the respondent on account of taxed costs.

Abdul Aziz Mohamad FCJ:

INTRODUCTION

[16] I have read in draft the judgment of my learned brother Augustine Paul FCJ. I agree that this appeal should be dismissed, but for somewhat different reasons.

[17] The facts are more or less as set out by my learned brother, although I feel it is necessary to make the following qualifications. The two sub-subcontracts were dated 23 September 1996, the dates in January 1997 being the dates of their issue. The settlement agreement was entered into in May 2003, before the dispute between the defendants and the plaintiffs under the sub-subcontracts arose. The clause relating to arbitration is only cl 40. The Court of Appeal, I believe through sheer inadvertence, had, in their grounds of judgment, entitled cl 41 as also one for arbitration. It was the president of the Institution of Engineers (M) who appointed the arbitrators under cl 40, not the defendants.

[18] In allowing the appeal of the plaintiffs (the respondents here) the Court of Appeal, according to their grounds of judgment, made two decisions. They first decided that the disputes involving the three parties, namely the dispute between the defendants (the appellant here) and the plaintiffs under the sub-subcontracts, which the defendants had initiated steps to take to arbitration, and the dispute between the plaintiffs and the main contractor TBV under the settlement agreement, which the plaintiffs had taken to court by the D3 action, ought to be resolved in the D3 action — under one roof, as the plaintiffs' counsel put it before us — one reason being to avoid duplicity of proceedings. Since the D3 action, when instituted, did not involve the defendants, to achieve the resolution of the disputes under the one roof of the D3 action, the Court of Appeal were of the 'considered view that the plaintiffs ought to bring in the defendants into the D3 action …'. Later on, however, perceiving somehow that the plaintiffs intended to proceed by consolidating the two proceedings, that is, the arbitration and the D3 action, said that the plaintiffs were 'justified in invoking' the provisions of O 4 r 1(1) of the Rules of the High Court 1980, about consolidation, 'in aid of (their) cause'.

[19] To give effect to the decision of the Court of Appeal that the disputes ought to be resolved under one roof, it was necessary that the arbitration of the dispute between the defendants and the plaintiffs under the

A sub-subcontracts be stayed. Therefore in allowing the plaintiffs' appeal the Court of Appeal made an order restraining the defendants from proceeding with the arbitration until further order. The second leave-question for the present appeal relates to this restraining order or injunction.

B **[20]** The Court of Appeal also, later in their grounds of judgment, decided that cl 40 of the sub-subcontracts was 'inconsistent' with cl 41, 'so much so that the court ought not give effect to the same', adding, 'Such disputes as exist between the parties should be decided by the court'. The first leave-question for the present appeal relates to that decision.

C

[21] That decision was what the plaintiffs sought in the High Court, where they sought a declaration that cl 41 prevailed over and overrode cl 40. In the present appeal, as in the courts below, the defendants's contention is that cl 41 D does not override cl 40. the plaintiffs' counsel informed us that when the appeal was heard the Court of Appeal had agreed with the defendants. Be that as it may, the plaintiffs now concede that the defendants and the Court of Appeal were right — that cl 41 does not override cl 40 — and do not now seek the upholding of the Court of Appeal's subsequent ruling in their E grounds of judgment that cl 41 overrode cl 40. With that concession, the first leave-question does not require to be given an answer, although I think the plaintiffs are right in so conceding.

[22] The plaintiffs, however, contend that despite the existence of the F arbitration cl 40 in the sub-subcontracts the Court of Appeal had the power to put the arbitration under injunction and had good reasons to exercise the power in the circumstances of this case. The plaintiffs' counsel submits that the second leave-question ought not to have included the second part about consolidation being the purpose of the injunction because the order of the G Court of Appeal did not state the purpose of the injunction. He explains that in the Court of Appeal, contrary to what the Court of Appeal said in their grounds of judgment, he did not invoke O 4 r 1(1) in aid of the plaintiffs' cause. He admits that he only referred to O 4 r 1(1) in order to make the point that if there was no injunction on the arbitration the plaintiffs would H not be able to have the entire dispute between the parties resolved under one roof because, without an injunction, the only course open to achieve that would be to consolidate the two disputes but it would not be possible under O 4 r 1(1) to consolidate the arbitration with the D3 suit. Therefore the only course open to the plaintiffs would be, as even the Court of Appeal I themselves said, to bring the defendants into the D3 action by a joinder procedure. But if that was to be done so that the entire dispute could be resolved in the D3 action, it was necessary that the arbitration proceedings be restrained in order to avoid duplicity of proceedings. The plaintiffs' counsel submits that were the second leave-question to be without its second part, the

question which would remain is a question about the power per se of the Court of Appeal to restrain arbitration proceedings, which should, in view of various statutory provisions and authorities, be answered in the affirmative.

[23] From the Court of Appeal's saying that the defendants ought to be brought into the D3 action, it would appear that the plaintiffs did not in the Court of Appeal represent that they would resort to consolidation to achieve a resolution of the disputes under one roof. As to O 4 r 1(1), the plaintiffs' written outline of submission in the Court of Appeal does include a quotation of that rule, but it is not apparent from the written outline what the plaintiffs' point was in quoting that rule. Whatever the truth may be, of primary importance is that the Court of Appeal merely placed an injunction on the arbitration and did not do so for the purpose of consolidation. They did so to enable the disputes to be resolved in the D3 action. How, in order to achieve that purpose, the defendants was to be brought into the D3 action is a secondary question and was not ordered by the Court of Appeal.

[24] It is obvious to me, from the manner in which the second leave-question is framed, especially from the contents of the 'purpose' part of it, that to the defendants, on whose behalf the question was framed, the answer to it should be in the negative, that is to say, the Court of Appeal did not have the power to injunct the arbitration, not because it was not vested with the power per se, but because the purpose of the injunction as stated in the question, that is, the purpose of consolidation, is not capable in law of achievement. If the stand of the defendants was that the Court of Appeal did not have the power to injunct arbitration proceedings in any event, there would have been no necessity to include the second part, the 'purpose' part, in the question. The inclusion of that part, which is the really essential part, implies a stand that even though the Court of Appeal has the power to injunct arbitration proceedings, it does not have the power to do so if it is for the purpose of consolidation as stated in the question.

[25] Since the Court of Appeal did not injunct the arbitration in this case for that purpose, the question as it stands has no factual basis and is hypothetical or conjectural. It cannot be answered as it stands. It can only be answered if the second part were removed, and the answer then, as the question impliedly accepts, and as I accept after considering the argument of the plaintiffs' counsel, would be in the affirmative.

Appeal dismissed with costs.

Reported by K Nesan